(1)

Supreme Court, U.S.
FILED

02 79 JUN 27 2002

OFFICE OF THE CLERK

CASE NO _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 2001

JACQUELINE J. MILLER-WAGENKNECHT
Petitioner,
V.
CITY OF MUNROE FALLS AND BETTE LYONS
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

Jacqueline J. Miller-Wagenknecht , Pro Se
P.O. Box 22458
Akron, Ohio 44302
Petitioner
330-573-4501

47pg

QUESTIONS PRESENTED

I. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that a municipal tax administrator must establish the intent or willfulness of an alleged violator of an Ohio Municipal Tax Ordinance as a condition precedent for probable cause in order to file a criminal complaint.

II. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that in a civil trial for malicious criminal prosecution for an alleged violation of a municipal tax ordinance, the instructions to the jury must include that intent or willfulness is a basic element of the ordinance and essential in the determination of probable cause.

III. Whether it is mandatory that when a defendant admits liability for violation of plaintiff's constitutional rights in his answer to a civil complaint and does not recant, then the trial court must grant judgment for the plaintiff.

TABLE OF CONTENTS

Page

Questions Presented.....i
Table Of Authorities Cited.....iii
Opinions Below.....1
Jurisdiction.....2
Constitutional Provisions.....2
Statement Of The Case.....3
Reasons For Granting the Writ.....6
Conclusion.....18
Appendix A Decision of The Supreme Court of Ohio 19
Appendix B Judgment Entry of the Court Of Appeals , Ninth Judicial District.....20
Appendix C Judgment Entry of the Court Of Appeals , Ninth Judicial District.....22
Appendix D Judgment Entry of the Court Of Appeals , Ninth Judicial District.....42

TABLE OF AUTHORITIES CITED

Page

Adamson v. May Co., (1982), 8 Ohio App. 3d 266 15
Bryan v. United States, 524 U.S. 184 (1998)..... 12
Cincinnati v. DeGolyer, (1971)
25 Ohio St. 2d 101..... 8, 13, 16
Cheek v. United States ,
498 U.S. 192 (1991)..... 6, 7, 11, 12, 14
Garza v. Clarion Hotel , Inc. 119 Ohio App. 3d 478
(1st Dist. Hamilton County,1997) 14

State v Burnett (2001), 93 Ohio St 3d 419..... 12
Spies v. United States, 317 U.S. 492 , 496 (1943)..... 12
Trussell v. General Motors Corp. (1990),
53 Ohio St. 3d 142 14
United States v. Bishop 412 U.S. 346(1973) 12
United States v. Murdock, 290 U.S. 389..... 7, 12

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V..... 2, 11
United States Constitution, Amendment XIV..... 3, 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Jacqueline J. Miller-Wagenknecht , respectfully petitions for a writ of certiorari to review judgment of The Supreme Court of Ohio in this case and the judgment of Ohio Court Of Appeals Ninth Judicial District which the Ohio Supreme declined jurisdiction .

OPINIONS BELOW

The April 3, 2002 Entry of The Supreme Court of Ohio is unreported and provided in Appendix A at page 19.

The February 8, 2002 Journal Entry of the Court Of Appeals Ninth Judicial District is unreported and provided in Appendix B at page 20.

The December 5 ,2001 Decision and Journal Entry of the Court Of Appeals Ninth Judicial District is unreported and provided in Appendix C at page 22.

The December 11 ,2001 Journal Entry of the Court Of Appeals Ninth Judicial District is unreported and provided in Appendix D at page 42.

JURISDICTION

The Judgment of the Decision and Journal Entry for the Court of Appeals Ninth Judicial District for the STATE OF OHIO was entered December 5, 2001. A timely Application for Reconsideration was denied by the Court of Appeals Ninth Judicial District for the STATE OF OHIO on February 8, 2002 . A timely appeal with a Memorandum in Support of Jurisdiction was denied by The Supreme Court of Ohio on April 3, 2002. This petition is timely filed within ninety days of that date, per Rule 13(1), Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private, property be taken for public use without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from Petitioner Jacqueline J. Miller-Wagenknecht's (" Miller-Wagenknecht") efforts to comply with any required tax obligation through her good faith reliance on tax professionals and attorneys. Munroe Falls Tax Administrator Bette Lyons' ("Lyons") interpretation and implementation of the local tax code was contrary to Miller-Wagenknecht's tax professionals, attorneys, as well as the Ohio Revised Code's position on such issues as the definition of domicile versus resident, timely file versus failure to file, and do federal extension supersede a local city's extension for filing. Though Miller-Wagenknecht timely filed all tax returns whether federal, state, or local, and where appropriate according to her tax professionals , Miller-Wagenknecht was twice criminally prosecuted for fail, refuse, or neglect to file a Munroe Falls City Tax Return.

For 1994 both Carl Wagenknecht and Miller-

Wagenknecht were domiciled and resided in Doylestown, Ohio. The Munroe Falls Municipal Tax Code in effect for 1994 required only those persons domiciled in Munroe Falls for 1994 to file a city tax return. The Munroe Falls Municipal Tax Code cross-referenced the Ohio Revised Code. Both the State and local tax code referenced the Internal Revenue Code. Miller-Wagenknecht informed Lyons by telephone and written correspondence that she was not domiciled in Munroe Falls in 1994 and therefore not required to file. Lyons was also told to direct any further inquires to her legal counsel.

Without the rendering of a written decision, providing a notice of any appeal right, or determining the intent of Miller-Wagenknecht, Lyons on October 27, 1995 signed a criminal complaint against Miller-Wagenknecht for fail, refuse, or neglect to file a 1994 Munroe Falls Tax return. The case went to trial on May 16, 1996. The case was withdrawn by the City and dismissed by the Court with prejudice. Miller-Wagenknecht agreed to file a city tax return for the last 2 weeks of 1994 without admitting that she was domiciled in Munroe Falls or required to file. . Miller-Wagenknecht's position then and now is that she was not required to file.

During all time relevant to this instant case Miller-Wagenknecht was represented by legal counsel and tax professionals who were in contact with Munroe Falls through their representatives such as Lyons. On or about April 11, 1996 Miller-Wagenknecht mailed extensions for the filing of tax returns to the Internal Revenue Service, State of Ohio, and Munroe Falls. Only Munroe Falls claimed to have not received the extension request. Miller-Wagenknecht was granted federal extensions until October 15, 1996.

On or about April 29, 1996, at a criminal proceeding

regarding the first criminal complaint, Prosecutor Dwayne Jones informed Brent English, attorney for Miller-Wagenknecht, that Munroe Falls had not received a return or extension from Miller-Wagenknecht. Lyons refused to accept at the Courthouse a copy of the request. Attorney Brent English then personally mailed on April 30 , 1996 an additional copy of the declaration for extension to Munroe Falls that was metered April 30, 1996. However it was postmarked May 1, 1996 and allegedly received May 3, 1996 by Munroe Falls. Though Miller-Wagenknecht timely filed a city tax return according to her tax professionals, Miller-Wagenknecht was again criminally prosecuted for fail, refuse, neglect to file a city of Munroe Falls Tax return. The Matter proceeded to trial and the Court found Miller-Wagenknecht, pro se, not guilty.

On May 15, 1997, Miller-Wagenknecht filed suit against the City of Munroe Falls and Bette Lyons in her governmental and private capacity in the Summit County Court of Common Pleas alleging Malicious Prosecution and Civil Rights Violations. An Amended Complaint was filed on October 28, 1998, redrafting claims and adding a Count for Abuse of Process. On December 11, 1998 Judge Schneiderman granted Defendant's Motion for Summary Judgment . On January 7, 1999, Plaintiff filed a Notice of Appeal in the trial court to the Court of Appeals, Ninth Judicial District. Having submitted the appeal, the Ninth District Court of Appeals found in favor of Plaintiff and remanded the case back to the trial court. Judge Schneiderman then recused himself and the trial was assigned to Judge Patricia Cosgrove. The trial commenced on or about September 19, 2000 and ended with Bette Lyons in her individual capacity being dismissed from the case by the Judge and the jury finding in favor of the Defendants

on all counts.

On October 25, 2000 Plaintiff timely filed a Notice of Appeal in the trial court to the Court of Appeals, Ninth Judicial District. Having submitted the appeal, the Ninth District Court of Appeals found in favor of Defendants. The Appeals Court denied an Application for Reconsideration. On April 3, 2002 The Supreme Court of Ohio denied jurisdiction to hear an appeal.

REASON FOR GRANTING THE WRIT

The Ohio Supreme Court's Decision to decline jurisdiction to hear this instant case and to dismiss the appeal as not involving any substantial constitutional question leaves standing the Court of Appeals , Ninth Judicial District for Ohio decision. Specifically, the Court of Appeals decision in this case directly conflicts with the United States Supreme Court Case *Cheek v. United States* , 498 U.S. 192 (1991).. *Cheek, supra* is cited throughout the nation as the standard for analysis regarding tax prosecutions.

The Ohio Court Of Appeals For the Ninth Judicial District has so far departed from the accepted and usual course of judicial proceedings as well as sanctioning such a departure by a lower court as to call for an exercise of The United States Supreme Court's review. Since the Ohio Supreme Court declined jurisdiction this Honorable Court must accept jurisdiction to insure constitutional guarantees.

The need for guidance from the United States Supreme Court is acute. This case is timely and provides a rare opportunity to provide that guidance. The public at large as

and /or a State's local municipal governments can ignore the holding in *Cheek v. United States* , 498 U.S. 192 (1991) that intent is a basic element in a tax prosecution. Ultimately the issue becomes one of due process .(see fifth and fourteenth amendment)

The ramifications of the Ohio Supreme Court's decision not to grant jurisdiction far overshadows the final outcome of this instant case. If the Appeals Court's decision is left to stand then due process of law is undermined and put into question throughout Ohio and the several States.

The Ohio Supreme Court in affirming the Court of Appeals decision, held that the holding in *Cheek v. United States* 498 US 192 , 192 (1991) that:

> "A good-faith misunderstanding of the law or good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made to the complexity of the tax laws. *United States v. Murdock*, 290 U.S. 389, is the voluntary, intentional violation of a known legal duty".

did not apply and had no precedential value to this instant case. The Court's rationale was that the *Cheek* case involved the construction of a highly technical federal statute.(Note: In *Cheek*, the petitioner was indicted for ten violations of federal law which included six counts of willfully failing to file a federal income tax return based upon Cheek's position that his wages were not taxable. *Id* at 194) The actual case against Cheek did

were not taxable. *Id* at 194) The actual case against Cheek did not involve any highly technical Federal tax laws.

In addition, the Court of Appeals upheld the holding in *Cincinnati v. DeGolyer* (1971) , 25 Ohio St. 2d 101, 106 that "intent is a basic element of the penalty provision of the [tax] ordinance" but concluded that said holding was not applicable to a civil complaint for a malicious criminal prosecution. The Court of Appeals further ruled that "although willfulness must be shown in a criminal case, to prove malicious prosecution in a civil case all that is needed is to show probable cause for the offense".

The Ohio Supreme Court as did the Court of Appeals, when considering the entire record, ignored the fact that the defendants, in the answer to both the original and amended complaints, denied that Miller-Wagenknecht had a clearly established constitutional right to due process of law, to be free of unreasonable searches and seizures, and to equal protection of the law.

The decision of the Court of Appeals eliminates intent or wilfulness as a basic element for probable cause in a criminal tax prosecution. By its ruling the Court of Appeals undermines legislative intent , the doctrine of stare decisis, the foundation of jurisprudence, the fundamental precepts of the legal profession, and through its own method of legal analysis creates an unsupported view of what constitutes probable cause in a criminal tax prosecution.

The Court of Appeals decision undermines the rule that lower courts are bound by rulings of higher courts and that state courts are bound by rulings of the United States Supreme Court. The decision of the Appeals Court establishes the precedent that a municipality can ignore the Ohio Revised

Code, the United States Code, Rules of Civil Procedure, Ohio Case Law, and/or United States Supreme Court Opinions by merely saying, without a finding of facts, that it simply does not apply. Furthermore, the decision of the Court of Appeals gives license to any local tax administrator to insert their own interpretation and definitions in any tax code, whether federal, state, or local, when administering the local tax ordinances. Moreover, the Court of Appeals decision ignores the basic procedural premise that a plaintiff is entitled to judgment when a defendant(s) admits liability in the answer to the complaint. The United States Supreme Court must address these issues immediately.

The implications of the Ohio Supreme Court's decision affects the entire legal profession, every governmental entity, every business, and has a direct impact on every person in the State of Ohio and the several States. The public's interest in the fair and impartial operation of the legal system is profoundly compromised and undermined by holding that a tax administrator is not bound by Ohio Revised Code, the Ohio Constitution, the United States Code, the United States Constitution, etc. but merely relies on what the local tax administrator believes to be the law and/or the facts, the basis of which is used to file a criminal complaint. The Decision of the Appeals Court only adds to the public's distrust, and lack of confidence in the integrity and impartiality of its government and judicial system. Such a holding would undermine the integrity of the administration of tax law and the fundamental principle that the rule of law constrain governments as well as citizens.

Similarly , the public's interest is affected in that legislative intent has been subverted by the court of appeals

decision in that municipal tax ordinances no longer require intent as a basic element for probable cause but that the ordinance is now one of strict liability.

Apart from the before mentioned governmental considerations, which makes this case one of great public interest, the decision of the Court of Appeals which the Ohio Supreme Court upheld has broad general significance impacting all persons in the State of Ohio as well as citizens of the several States both directly and indirectly. A significant representation of persons in the several States rely on tax professionals to advise, prepare, and oft times mail their required tax returns whether Federal, State, or local. With the court of Appeals decision a person can no longer escape criminal prosecution when relying in good-faith on the advise of tax professionals or attorneys. However, a tax administrator/municipality is immune from liability if advise of counsel is sought. The redress left for the citizen would be a civil lawsuit for malpractice against the tax professional or attorney. Regardless, the person who relied on the advise of tax professional(s) would still be facing criminal charges if said information was believed erroneous by a tax administrator whether or not it in fact was.

Also, the Court of Appeals decision would have a chilling effect on tax professionals and the tax related businesses because of the potential for increased lawsuits translates into increased malpractice insurance premiums. The public has already seen the consequences of such a scenario in the health profession.

The decision of the Court of Appeals sets a precedent that intent is not a basic element of probable cause for a tax ordinance. Under this rule a local tax administrator could criminally prosecute anyone whom the City or the Tax

liberally construe the ordinance against the accused and in favor of the municipality. Then attack the citizen for what ever reason and then look for protection from the rest of the government and the courts.

Furthermore, the Court of Appeals set a precedent in that a local tax administrator and/or municipality could file a criminal tax complaint without securing proof of service to the alleged violator as to a finding of facts, a decision, and the opportunity and means to appeal such a decision, thus denying the alleged violator of his 5th and 14th amendment constitutional right to due process of law whose basic elements include "notice and opportunity".

In summary, if allowed to stand, the Court of Appeals decision would have granted itself power usurping not only the higher court opinions but the constitution itself thus adding to the public distrust of its government and its legal system. This court must grant jurisdiction to hear this case to avoid the great future damage to citizens of this state and the several States based upon this perilous and erroneous Ohio Supreme Court decision to uphold the appeals court decision.

Finally if *Cheek v. United States* , 498 U.S. 192 (1991). is applied to this case sub judice then the Supreme Court of Ohio and the Court of Appeals. Ninth Judicial District decisions are erroneous.

I. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that a municipal tax administrator must establish the intent or willfulness of an alleged violator of an Ohio Municipal Tax Ordinance as a

alleged violator of an Ohio Municipal Tax Ordinance as a condition precedent for probable cause in order to file a criminal complaint.

The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses *Cheek v. United States* , 498 U.S. 192, 199-200 (1991). In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law and it is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. *United States v. Bishop* 412 U.S. 346, 360-361 (1973) (quoting *Spies v. United States*, 317 U.S. 492 , 496 [1943]) (see *Bryan v. United States*, 524 U.S. 184, 194-195 n. 20 [1998]).

"A good-faith misunderstanding of the law or good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made to the complexity of the tax laws. *United States v. Murdock*, 290 U.S. 389, is the voluntary , intentional violation of a known legal duty" *Cheek, supra* at 192.

It is well established that the Supreme Court of Ohio is bound by rulings on federal statutory or constitutional law made by the United States Supreme Court. *State v. Burnett* (2001), 93 Ohio St. 3d 419, syllabus. The Ohio Supreme Court was

very clear on the element of intent in *Cincinnati v. De Golyer, supra*:

> * * * The ordinance provides that "Any person who shall fail, neglect or refuse to pay the tax * * *shall be fined not more than five hundred ($500) dollars or imprisoned not more than six (6) months." It will be noted that the ordinance does not specifically make intent an element of the offense. Yet, one of the words "refuse" necessarily implies willfulness or intent. Without the element of willfulness or intent this provision of the ordinance, so far as it provides for imprisonment, must fall as being violative of the provisions of Section 15 of Article I [Ohio Constitution]. *Cincinnati v. De Golyer, supra* at 105-106.

How can a city official be permitted to file criminal charges and not be responsible for the knowledge of the laws being administered? Lyons testified that she did not inquire and did not know the intent of Miller-Wagenknecht as to whether or not Miller-Wagenknecht was intentionally avoiding a known duty.

Lyons testified as follows:

> Q. [by Plaintiff's Counsel] Was there anything that indicated during this time of 1995 that Jacqueline was not intending to file anything?
>
> A. [by Lyons] I can't speak for her motives or her intentions.
>
> [Transcript of Proceedings, Vol.2 , p.299]

order to have a tax crime, criminal intent is essential. Therefore, it was incumbent upon the state to determine the intent of any citizen prior to filing a complaint for a tax crime.

II. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that in a civil trial for malicious criminal prosecution for an alleged violation of a municipal tax ordinance, the instructions to the jury must include that intent or willfulness is a basic element of the ordinance and essential in the determination of probable cause.

The elements of the tort of malicious criminal prosecution are:(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Trussell v. General Motors Corp.* (1990), 53 Ohio St. 3d 142, syllabus. In evaluating the probable cause element of the tort of malicious prosecution, defendant's conduct must be weighed in view of facts and circumstances that defendant knew or should have known at the time of instigation of criminal proceedings. *Garza v. Clarion Hotel , Inc.* 119 Ohio App. 3d 478, 695 N.E. 2d 811 (1st Dist. Hamilton County, 1997) Public policy demands that before an accuser [tax administrator] files a criminal complaint that the accuser [tax administrator] understand the elements of the crime.

Ohio cases involving malicious criminal prosecution must be treated as establishing a legal presumption that the

must be treated as establishing a legal presumption that the accuser [i.e. tax administrator] had probable cause for his accusation if a bind over order or and indictment [or criminal complaint] results, unless the related preliminary hearing or grand jury proceeding [or criminal complaint] received perjured testimony or was otherwise significantly irregular. *Adamson v. May Co.* , (1982), 8 Ohio App. 3d 266, 268.

This rebuttable presumption is necessary to insure that the elements of the alleged offense were not changed or that a truly malicious accuser [tax administrator] could be shielded from civil liability. This rebuttable presumption is a legal safeguard whether to defeat summary judgment or to insure that the jury is instructed properly. The Ohio Appeals Court in *Adamson v. May Co.* , (1982), 8 Ohio App. 3d 266, 269 held that:

> "A malicious prosecution action fails without proof that the criminal case terminated favorably for the accused. It should be obvious that the bind over order and the indictment [criminal complaint] should not have conclusive weight. **A contrary rule would change the elements of this action and exclude recovery in any case where there has been a bind over order or an indictment [criminal complaint] regardless of its fanciful or unfounded source.** The ability to rebut probable cause presumed from an indictment [criminal complaint] is particularly significant, since the grand jury's[tax administrator's] evidence is usually secret and beyond the plaintiff's reach. **If the probable cause presumption were not rebuttable, a truly malicious accuser [tax**

> **administrator] could lie at the preliminary hearing or the grand jury sessions [or criminal complaint] and thereby obtain a bind over order or an indictment [or criminal complaint] which screened him [a tax administrator] from civil liability for his malicious prosecution."** (emphasis added)

Hence, it is incumbent that the trial court insures that the elements of the criminal offense prosecuted for be included in the jury instructions.

The jury must have the elements of the crime of failure, neglect, or refusal to file in order to establish whether there was probable cause for Munroe Falls to file the charges against the Petitioner. In *Cincinnati v. DeGolyer, supra*, the court called "***intent***" a **"*basic element*"** of the criminal tax ordinance which parallels the one in Munroe Falls. Without instructing the jury as to the necessity of establishment of "***intent to avoid a known duty***", the jury was left with a vague notion that somehow since Munroe Falls could not locate in its possession a tax form or an extension form from the Petitioner, that somehow this was equal to probable cause for a criminal act of "failure to file." The Respondents in closing argument told the jury that "failure" referred simply to not doing some act or action as follows:

> Intent. They threw up another red herring. There is not an intent part of this ordinance. Either fail to file -- fail to file timely is really easy. She didn't file by April 30th. That's real simple. That's real simple. Intent, you know that's not part of this case."

[Transcript of Proceeding, Vol.5 , p.743]

III. Whether it is mandatory that when a defendant admits liability for violation of plaintiff's constitutional rights in his answer to a civil complaint and does not recant, then the trial court must grant judgment for the plaintiff.

Rule 8 (B) of the Ohio Rules of Civil Procedure states in pertinent part that:

> "(B) Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon the adverse part relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment , the party shall so state and this has the effect of a denial.. When the pleader does intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Civ. R. 11".

The Respondents in response to statement 43 of the original complaint denied that Miller-Wagenknecht had a clearly established constitutional right to due process of law, to be free of unreasonable searches and seizures, and to equal protection of the law. Respondents affirmed their position by denying statement 63 of the amended complaint which alleged that

Miller-Wagenknecht had a clearly established constitutional right to due process of law, to be free of unreasonable searches and seizures, and to equal protection of the law.

In denying Petitioner's Motion for direct judgment , the trial court said that since it was a general denial the Court will instruct the Jury that a person has protection under the Equal Rights Amendment. However, such action by the trial court did not alter the fact that Respondents have still never recanted from their position that Miller-Wagenknecht has no such rights.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

Jacqueline J. Miller-Wagenknecht, Pro Se
P.O. Box 22458
Akron, Ohio 44302
Petitioner
330-573-4501

APPENDIX A

THE SUPREME COURT OF OHIO

Jacqueline J. Miller-Wagenknecht, Appellant,	:	Case No. 02-79
v.	:	Filed: April 03, 2002 Marcia J. Mengel Clerk Supreme Court of Ohio
City of Munroe Falls et al., Appellees.	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Carl R. Wagenknecht, Jr.

(Summit County Court of Appeals; No. 20324)

/S THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

APPENDIX B

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)SS	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JACQUELINE J MILLER-WAGENKNECHT Appellant v. CITY OF MUNROE FALLS, et al. Appellee	C.A. No. 20324. Filed Court Of Appeals Diana Zaleski 2002 Feb 8 Am 11:57 Summit County Clerk of Courts JOURNAL ENTRY

Appellant has moved this court to reconsider our decision and journal entry, which was journalized on November 5, 2001, and which affirmed the jury finding of no liability. Appellees have responded to the motion.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. Of Edn.* (1992), 85 Ohio App.3d 117. Appellant argued that the

decision should be reconsidered because: (1) she was domiciled in Doylestown and not Munroe Falls; (2) she was denied an instruction pursuant to *Cheek v. United States* (1991), 498 U.S. 192; (3) she committed no crime by failing to file a tax return on the day mandated by the Municipal Falls tax ordinance; (4) the actions of the city in proceeding with a criminal tax prosecution denied due process and equal protection and were violative of the Fourth Amendment; (5) opposing counsel misstated the record during closing argument; and (6) the trial court erred in excluding the testimony of an attorney regarding one previous Munroe Falls tax case.

The court finds that the motion for reconsideration in this case neither calls attention to an obvious error nor raises an issue that we did not consider properly. The motion is denied.

/S Donna Carr
Judge

/S William Baird
Judge

A copy of this journal entry is being served upon the following:

Carl R. Wagenknecht, Jr., Attorney at Law, P.O. Box 22458, Akron, Ohio, 44302

John T. McLandarich, , Attorney at Law, 100 Franklin's Row, 34305 Solon Rd., Cleveland, Ohio 44139.

Michael L. Cole , Attorney at law, 863 North Cleveland-Massillon Rd., Akron, Ohio 44333

APPENDIX C

STATE OF OHIO) SS COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
JACQUELINE J. MILLER-WAGENKNECHT	C.A. NO 20324
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CITY OF MUNROE FALLS, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 97 05 3468

DECISION AND JOURNAL ENTRY

Dated: December 5, 2001

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

Appellant-plaintiff Jacqueline J. Miller-Wagenknecht has

appealed the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

On August 31, 1994, Miller-Wagenknecht purchased a home in Munroe Falls. A Munroe Falls tax ordinance required that tax returns be filed no later than April 30 for the previous tax year. April 30, 1995, passed without Miller-Wagenknecht filling a tax return.

Tax administrator Bette Lyons mailed two letters on July 30 and August 23, 1995 to Miller-Wagenknecht at her Munroe Falls address. Miller-Wagenknecht did not respond. Phone calls in September and October of 1995 to Miller-Wagenknecht were unsuccessful as well.

On November 17, 1995, a criminal complaint was filed in the Cuyahoga Falls Municipal Court for failure to file a 1994 tax return. Pursuant to a plea agreement, Miller-Wagenknecht agreed to file a tax return and pay half of the court costs in exchange for the dismissal of the charges.

The next tax year, Miller-Wagenknecht again failed to file a tax return on or before April 30, 1996, for the tax year 1995. Belatedly, Miller-Wagenknecht sent a purported request for extension from Munroe Falls. As the request for extension was untimely made, the request was denied by letter sent to Miller-Wagenknecht on May 22, 1996. Lyons sent another letter to Miller-Wagenknecht on July 31, 1996, reminding her that a 1995 tax return needed to be filed. Miller-Wagenknecht failed to respond to either correspondence.

In a reprise of the previous year, a criminal complaint was filed on September 20, 1996, for failure to file a 1995 tax return. Miller-Wagenknecht belatedly filed her tax return on October 15, 1996. However, the tax return was not complete.

The matter proceeded to trial. The trial court, sitting as the trier of fact, denied a pre-trial motion to dismiss for lack of probable cause. At the end of the trial, the court found Miller-Wagenknecht not guilty.

On May 15, 1997, Miller-Wagenknecht filed suit against Munroe Falls and Bette Lyons in her governmental and private capacity in the Summit County Court of Common Pleas alleging malicious prosecution, abuse of process, and civil rights violations. On December 11, 1998, the court of common pleas granted summary judgment against Miller-Wagenknecht. On direct appeal to this Court, the case was reversed and remanded for trial.

Trial commenced on September 19, 2000. The trial court dismissed Bette Lyons in her individual capacity from the case. Ultimately, the jurors found the defendants to be not liable.

Miller-Wagenknecht has now appealed, raising five assignments of error.

II.

ASSIGNMENT OF ERROR I

The court erred in its charge to the jury as to the applicable law in such a manner as to be determinative of the outcome, prejudicial to the Plaintiff - Appellant, and therefore making the verdict of the jury contrary to law.

In her first assignment of error, Miller-Wagenknecht claims that the trial court erred when it declined to give a proposed instruction. Specifically, Miller-Wagenknecht claims that the jury should have been charged that they must determine whether she willfully failed to file a tax return pursuant to *Cheek*

v United States (1991), 498 U.S. 192. Miller-Wagenknecht also claims that the absence of the proposed instruction was outcome determinative of the case. This Court disagrees.

A. Inapplicability of *Cheek*

In *Cheek*, the United States Supreme Court construed provisions of the federal tax code, namely 26 U.S.C. Sec. 7201 and 7203, and gave effect to the term "willfully" as expressly set forth in those sections, *Cheek, supra*, at 194-195. The *Cheek* Court construed the term "willfully" solely as a matter of federal statutory construction. *Id.* at 199-202. See, also, *Bryan v. United States* (1998), 524 U.S. 184, 193-194 (Distinguishing the "willfully" analysis of Cheek as involving "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.").

The instant case does not involve the construction of a highly technical federal statute. Munroe Falls Ordinance 181.99(A)(1) and (11) provides: "Any person who *** (f)ails, neglects or refuses to make any return or declaration required by this chapter***shall be guilty of a misdemeanor." Munroe Falls Ordinance 181.05 requires each taxpayer to file a return on or before April 30 for the previous tax year. Accordingly, *Cheek* holds no precedential value to the instant case.

B. Not Outcome Determinative

Miller-Wagenknecht also cites to *Cincinnati v. DeGolyer* (1971), 25 Ohio St.2d 101, as support for her claim that the jury should have been instructed on the term "willfully" as an element of the criminal charge against her. "A municipal income tax, due and unpaid, is a debt within the meaning of Section 15 of Article I of the Ohio Constitution, and in the absence of a willful failure or refusal to pay, or fraud, one may not be imprisoned for failure to pay such a tax." *Id.* at

paragraph one of the syllabus.

The tax ordinance reviewed in *DeGolyer* provided that "one who fails, neglects or refuses to pay the tax is guilty of a misdemeanor and may be fined or imprisoned therefor." *Id.* at 102. Because Section 15 of Article I of the Ohio Constitution proscribes imprisonment for debt, the *DeGolyer* Court concluded that "one may not be imprisoned for the mere failure to pay taxes, in the absence of willful refusal or fraud." (Citation omitted.) *Id.* at 104-105.

Quite apart from a criminal case, the instant case involved a civil complaint for malicious prosecution. To prove malicious prosecution, a plaintiff must show the following: "(1) malice in instituting or continuing the prosecution: (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused." *Trussell v. General Motors Corp.* (1990), 53 Ohio St.3d 142, syllabus. Although willfulness must be shown in a criminal case, to prove malicious prosecution in a civil case all that is needed is to show probable cause for the offense. The trial court need not discuss the finer points of *mens rea.*

This Court turns then to review the propriety of the trial court's instruction as to probable cause. The trial court charged the jury on probable cause as follows:

> Probable cause is defined as a reasonable ground - a reasonable ground of belief , supported by trustworthy information and circumstances known to the Defendant and sufficiently strong to cause a reasonably careful person, under similar circumstances, to believe that the Plaintiff was guilty of committing the crime of failure to file a City

> income tax return.
>
> A person has probable cause to believe and act if a reasonable person would have so believed and acted.
>
> If you find that the Defendant had probable cause to believe that the Plaintiff was guilty of the crime of failure to file a City income tax when the criminal prosecution - I am sorry. Let me state that again.
>
> If you find that the Defendant had probable cause to believe that the Plaintiff was guilty of the crime of failure to file City income tax, then the criminal prosecution was lawful.

The foregoing instruction is consonant with the law of Ohio. See 3 OJI 330.03.

Accordingly, the trial court properly and sufficiently charged the jury.

Miller-Wagenknecht's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

The verdict of the jury is against the manifest weight of the evidence.

In her second assignment of error, Miller-Wagenknecht claims the verdict of the jury was not supported by the manifest weight of the evidence. This Court disagrees.

When the manifest weight of the evidence is challenged "an appellate court conducts the same manifest weight analysis in both criminal and civil cases." *Ray v. Vansickle* (Oct. 14, 1998), Lorain App. Nos. 97CA006897/97CA006907, unreported.

> The [reviewing] court *** weighs the evidence and all reasonable inferences, considers the

> and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.

State v. Thompkins (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983),20 Ohio App.3d 172, 175. Moreover, "every reasonable presumption must be made in favor of the judgment and the findings of facts[.]" *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Furthermore, "if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment." *Id.*

At trial, Miller-Wagenknecht set forth three causes of action: malicious prosecution, abuse of process, and violation of civil rights under 42 U.S.C. Sec. 1983.

A. Malicious Prosecution

As set forth *supra* in the first assignment of error, the test for malicious prosecution is: "(1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused." *Trussell, supra*, at syllabus. Reviewing the evidence in the record, Miller-Wagenknecht failed to timely file tax returns in successive years. In 1995, Miller-Wagenknecht failed to timely file a return by the deadline of April 30. Repeated written and telephone correspondence went unreturned. Only on November 17, 1995, was a criminal charge filed for the tax year 1994. The

following year, April 30, 1996, came and went without Miller-Wagenknecht filing her tax return. A belated request for extension of time was denied by letter on May 22, 1996. On July 31, 1996, yet another letter was sent to Miller-Wagenknecht reminding her that a tax return needed to be filed. Both written correspondences were never responded to, whereupon a criminal complaint for failure to file a tax return was filed on September 20, 1996. Miller-Wagenknecht's failure to file timely tax returns, and failure to correspond thereafter, are what led to the eventual criminal charges. Based on the record before us, this Court cannot conclude that the jury clearly lost its way based on our review of the evidence.

B. Abuse of Process

The tort of abuse of process provides a remedy for a related yet different situation to a claim of malicious prosecution: an action that can be brought even though probable cause does exist. See *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 297-298. Abuse of process requires proof that: (1) a legal proceeding is properly initiated with probable cause; (2) the proceeding has been perverted to accomplish an ulterior motive beyond which it was designed; and (3) direct damage ensued from the wrongful use of process. *Id.* At paragraph one of the syllabus. In *Kremer v. Cox* (1996), 114 Ohio App. 3d 41, 51-52, this Court elucidated on the differences between the tort of abuse of process and the tort of malicious prosecution:

> The tort of abuse of process arises when one maliciously misuses legal process to accomplish some purpose not warranted by law. The key to the tort is the purpose for which process is used

once it is issued. *Abuse of process does not lie for the wrongful bringing of an action*, but for the improper use, or 'abuse,' of process.***Thus, if one uses process properly, but with a malicious motive, there is no abuse of process, though a claim for malicious prosecution may lie[.]***The tortious character of the defendant's conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]

Clermont Environmental Reclamation Co. v Hancock (1984), 16 Ohio App.3d 9,11,474 N.E.2d 357. (Citations omitted, emphasis added.) "Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court itself is powerless to order." *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St.3d 264, 271, 662 N.E. 2d 9.***

Even though the tort of malicious prosecution and the tort of abuse of process have different elements, in some situations the same elements which may constitute abuse of process may also support an action for malicious prosecution. In that case, a complaint could allege both causes of action, in separate counts. In such a situation, *a consideration of whether probable cause was present to bring the underlying litigation would be the key to determining under*

> *which tort theory the action should proceed. Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A*[(1994), 68 Ohio St.3d 294, 298]. (Emphasis added.)

In *Kremer*, this Court determined that to sustain an abuse of process claim, the plaintiff must allege and demonstrate the presence of probable cause. See, e.g., *Gunaris v. Holiday Lakes Property Owners Association, Inc.* (Feb. 12, 1999), Huron App. No. H-98-032, unreported ("One of the elements essential to an abuse of process claim is that the offending action must have been instituted with probable cause.***In this case, the trial court found that appellants only alleged that the initiation of the initial complaint against them was "without probable cause." Nothing in the complaint alleges, in the alternative, that the acts complained of were instituted with probable cause as required to establish a claim for abuse of process. Therefore, since an essential element was missing from the complaint, the trial court properly dismissed appellants' claim for abuse of process[.]") (Citations omitted.)

In the instant case, Miller-Wagenknecht does not allege or provide any evidence of probable cause, and in fact argues that there was no probable cause to support the charges against her. Based on this evidence, this Court cannot say that the jury clearly lost its way in finding no liability for abuse of process.

C. 42 U.S.C. Sec. 1983

In her third cause of action, Miller-Wagenknecht alleged a violation of 42 U.S.C. Sec. 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress[.]

Miller-Wagenknecht asserts that under the foregoing provision of law her rights of due process and equal protection were violated. Miller-Wagenknecht decries that: (1) she was "unilaterally investigate[d]"; (2) in the second case, did not receive notice of the denial of her extension to file tax return; (3) failed to assign a fine for late filing instead of pursuing criminal charges; (4) Munroe Falls did not offer her the option of filing a tentative return; and (5) the absence of criminal charges against her husband, Carl Wagenknecht (counsel for appellant) demonstrates a differing treatment connoting an equal protection violation.

This Court is not surprised that a governmental entity might choose to "investigate" a criminal offense without consulting the subject of the investigation. If unilateral investigations were held to produce constitutional error then all prisons would be laid bare. This Court cannot find, nor does Miller-Wagenknecht set forth, any authority supporting her claim.

The mere existence of other remedies does not compel Munroe Falls to consult with Miller-Wagenknecht, the reluctant taxpayer, about which remedy would be most convenient and agreeable for her, and conform their actions to her will. It is

well settled that the government enjoys prosecutorial discretion in its charging decisions, so long as it does not discriminate against any class of defendants. *United States v. Batchelder* (1979), 442 U.S. 114, 124. No such class discrimination is alleged by Miller-Wagenknecht. The absence of criminal charges against Carl Wagenknecht does not give rise to a constitutional question. Likewise, notice of a denial of a request for extensions of time to file a tax return, made *after* the tax return was due, does not assume a constitutional dimension, and is irrelevant to the prosecutor's decision to charge Miller-Wagenknecht for failure to file a timely tax return.

In relation to Miller-Wagenknecht's other claims, recently this Court has expounded on the application of 42 U.S.C. Sec. 1983 to actions for malicious prosecution and abuse of process:

> "In researching the use of a claim of malicious prosecution as the basis for a Section 1983 action, we have found that the question of whether such a claim is actionable under Section 1983 is a subject 'on which there is an embarrassing diversity of judicial opinion.' *Albright v. Oliver* (1994), 510 U.S. 266, 271 127 L.Ed.2d 114, 121, fn. 4, 114 S.Ct. 807,***." *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d.881,889,694 N.E.2d 167. However, the United States Court of Appeals for the Sixth Circuit has recognized such a cause of action. *Broadnax*, 118 Ohio App.3d at 889. To establish such a cause of action, one must plead and prove the state tort elements for malicious

> prosecution as well as show that one was deprived of a right secured by the Constitution and laws of the United States under color of state law, pursuant to Section 1983. *Id.* at 889-90. Even if one were "able to show all the elements of the state tort, a Section 1983 action is only proper when 'the misuse of legal proceedings is so egregious as to subject the aggrieved individual to deprivation of constitutional dimension." (Citation omitted.) *Id.* at 890.***
>
> Mr. Cochran also plead and prove the essential elements of the state tort to maintain an action for abuse of process under Section 1983. *Broadnax*, 118 Ohio App. 3d at 890. *** Mr. Cochran specifically avers in his complaint that Norton's actions were "without probable or reasonably cause[.]" Hence, as an action for abuse of process must be based on legal proceedings set in motion in proper form and with probable cause, summary judgment was properly entered on this claim.

Cochran v. Norton (Aug.1, 2001), Summit App. No. 20418, unreported. This Court has already determined that the jury's finding of no liability for malicious prosecution and abuse of process was supported by the manifest weight of the evidence. Therefore, this Court cannot conclude that the alleged violations were so egregious as to subject Miller-Wagenknecht to a deprivation of constitutional dimension.

The second assignment of error is overruled.

ASSIGNMENT OF ERROR III

The trial court erred by allowing attorney misconduct, in violation of his duty as an officer of the court, as the jury was intentionally misled, resulting in an unfair trial.

In her third assignment of error, Miller-Wagenknecht claims that opposing counsel engaged in misconduct during closing argument, giving rise to reversible error. However, Miller-Wagenknecht did not object to the comments of opposing counsel during closing argument. Where a party fails to timely object to improper comments pronounced in a closing argument at a time when the trial court could correct the record, then the party has waived the right to challenge the alleged error on appeal. *Koczan v. Graham* (Sep. 27, 2000), Lorain App. No. 98 CA007248, unreported. Therefore, the third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

The trial court erred when it dismissed Bette Lyons from the law suit (sic) on all counts in her individual capacity.

In her fourth assignment of error, Miller-Wagenknecht claims the trial court erred when it dismissed Munroe Falls tax administrator Bette Lyons from the case in her individual capacity. This Court disagrees.

Civ.R.50(A)(4) provides:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the

> evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

A motion for directed verdict tests the legal sufficiency of the evidence presented; accordingly, neither the weight of the evidence nor the credibility of witnesses may be properly considered. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 33, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284. If substantial, competent evidence has been presented from which reasonable minds could draw different conclusions, the motion must be denied. *Wagner v. Roche Laboratories, Inc.* (1996), 77 Ohio St.3d 116, 119. Because a directed verdict presents a question of law, we review the trial court's judgment *de novo*. *Hardy v. General Motors Corp.* (1998), 126 Ohio App.3d 455, 462, citing *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6, 13.

Regarding the claims for malicious prosecution and abuse of process, both arising under state law, Bette Lyons was acting in her capacity as tax administrator when a criminal complaint was filed upon the alleged violations of the Munroe Falls tax ordinance. Under R.C. 2744.03(A)(6)(a) and (b), Lyons's actions were immune from liability unless the actions undertaken were manifestly outside the scope of her employment, or were done in bad faith with a malicious purpose. Miller-Wagenknecht failed to timely file her tax returns, and Lyons followed the letter of the law and caused a

criminal complaint to be filed.

With regards to the claim of equal protection and due process violations under 42 U.S.C. Sec. 1983, immunity under R.C. 2744.03 does not apply to bar a federal civil rights claim. R.C. 2744.09(E). See, also, *Wohl v. Cleveland Bd. Of Educ.* (1990), 741 F. Supp. 688, 690-691.

However, qualified immunity applies. Lyons pled the defense of qualified immunity in her answer. In *Martin v. Eastlake* (N.D.Ohio 1988), 686 F.Supp. 620, 624-626, the District Court for the Northern District of Ohio elegantly set forth the applicability of qualified immunity to 42 U.S.C. sec. 1983 actions:

> Unlike absolute immunity, qualified immunity does not provide total protection to a defendant in a [sec] 1983 case. *** Qualified immunity, in its simplest terms, is given to an officer who may have violated a constitutional right of a person, if the officer's actions are such that a reasonable officer could have believed that the actions were lawful, in light of clearly established law and the information the officer possessed. In effect, qualified immunity may shield from liability, an officer who violates another's constitutional rights.
>
> ***
>
> The focus of the qualified immunity defense***is not on whether the constitutional right was established or not, but is on whether a reasonable [public official] would have believed that the actions violated clearly established

constitutional rights.

See, also, *Bothke v. Fluor Engineers & Constructors, Inc.* (C.A.9, 1987), 834 F.3d 804, 810-812.

In the instant case, Lyons did plead the defense of qualified immunity in her answer. "[F]ollowing the presentation of the plaintiff's case*** a defendant may move for a directed verdict on either or both grounds that the plaintiff has failed to prove a constitutional violation or that the plaintiff has failed to prove sufficient facts to deny the defendant the qualified immunity defense." *Martin, supra*, at 629. Lyons was dismissed from the case upon a motion for directed verdict.

Miller-Wagenknecht failed to timely file her tax returns, and after meaningful delay, Lyons referred the matter for criminal prosecution in successive years. In light of the information that Lyons possessed, her conduct was within the bounds of the law when she referred the matter for prosecution. Being a tax collector may no be a popular job, but the state of the record is that Lyons was doing her job and nothing more. Miller-Wagenknecht has failed to adequately rebut the assertion of qualified immunity by Lyons.

The fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

The Court erred when it did not permit Attorney Tony Dalayansis to testify regarding the merits of criminal complaints brought by Bette Lyons, the testimony of Dwayne Jones, and the pattern and practice of Munroe Falls.

In her fifth assignment of error, Miller-Wagenknecht

claims the trial court should have allowed testimony from Attorney Tony Dalayansis regarding the experience of two of his clients who were not parties to the case, his opinion as to the merits of the criminal complaint, and inquiry into the custom and practice of Munroe Falls for charging tax violators. This Court disagrees.

It is axiomatic that the admission of relevant evidence lies within the sound discretion of the trial court. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d269, 271. An abuse of discretion is more than an error of law or judgment, it implies an unreasonable, arbitrary, or unconscionable act by the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

In the instant case, the trial court voir dired the witness proferred by Miller-Wagenknecht, Attorney Dalayansis. During the voir dire it became clear that Attorney Dalayansis testimony was not about the course of practice or course of conduct of Munroe Falls, but rather was a commentary on the credibility of Lyons as far as sending mail or not sending mail in the past. Likewise, the proferred testimony could not be construed as impeachment evidence against the prosecution initiated by Munroe Falls because there was no contradiction to evidence in the record involving Miller-Wagenknecht. Moreover, the testimony of Attorney Dalayansis was a litany of improper hearsay information received from his former clients that would not be admissible at trial. See Evid.R. 801(C) and 802. Stated simply, Miller-Wagenknecht's claim that Attorney Dalayansis was offered to give admissible course of conduct and practice testimony of Munroe Falls does not withstand review.

This Court concludes that any such testimony would

have been irrelevant and confused the issues relating to the central question of whether there was probable cause to file a criminal charge under the Munroe Falls tax ordinance. See Evid.R.402 and 403. Accordingly, this Court cannot conclude that the trial court abused its discretion in excluding the testimony.

The fifth assignment of error is overruled.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R.27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Cost taxed to appellant.

Exceptions.

/S DONNA J. CARR
DONNA CARR
FOR THE COURT

BAIRD, P.J.
WHITMORE,J.
CONCUR

APPEARANCES:

CARL R. WAGEKNECHT, Attorney at Law, 611 W. Market St., Suite C. Akron, Ohio 44303, for appellant.

ROBERT H. STOFFERS, Attorney at Law, 100 Franklin Row, 34305 Solon Rd., Cleveland, Ohio 44139, for appellees.

MARK H. LUDWIG, Attorney at law, 863 North Cleveland-Massillon Rd., Akron, Ohio 44333-2167, for Bette Lyons appellee.

APPENDIX D

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	
	)	
JACQUELINE J. MILLER-WAGENKNECHT Appellant		C.A. No. 20324
v.		
CITY OF MUNROE FALLS, et al. Appellees		JOURNAL ENTRY

On December 5, 2001, this court released *Miller-Wagenknecht v. City of Munroe Falls, et al.*, Summit App. No. 20324, unreported. The printed version of that opinion contains an error. Specifically, the appearances section located on page nineteen of the opinion incorrectly listed Mark H. Ludwig, as the attorney for appellee Bette Lyons. Attorney Michael L. Cole appeared on behalf of appellee.

"Mark H. Ludwig" is hereby deleted from the text of that section and is replaced with "Michael L. Cole."

_____

Presiding Judge William R. Baird

_____

Judge Donna J. Carr

A copy of this Journal entry is being served upon the following:

Carl R. Wagenknecht Jr., Attorney at Law, 611 West Market Street, Suite C, Akron, OH, 44303.

Michael L. Cole and Mark H. Ludwig, Attorneys at Law, 863 North Cleveland-Massillon Rd., Akron, OH, 44333-2167.

John McLandrich, Robert Stoffers, and Paul Cristallo, Attorneys at Law, 100 Franklin's Row, 34305 Solon Road, Cleveland, OH, 44139.

Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

No. 02-79

In The

Supreme Court of the United States

JACQUELINE J. MILLER-WAGENKNECHT,

Petitioner,

v.

CITY OF MUNROE FALLS AND BETTE LYONS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

JOHN T. MCLANDRICH
Counsel of Record
PAUL J. CRISTALLO
MAZANEC, RASKIN & RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906

Counsel for Respondents City of Munroe Falls and Bette Lyons, in her official capacity

AMIE L. BRUGGEMAN, Esq.
Law Director for City of Munroe Falls
43 Munroe Falls Avenue
Munroe Falls, Ohio 44262

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner Jacqueline Miller-Wagenknecht is a tax protester who failed to timely file tax returns with the City of Munroe Falls for tax years 1994 and 1995. Regarding her failure to pay taxes for 1994, the proceedings against Ms. Miller-Wagenknecht resulted in a plea agreement whereby Ms. Wagenknecht agreed to pay taxes to the City of Munroe Falls. Petitioner then failed to timely pay her 1995 Munroe Falls taxes. The subsequent prosecution ended with Ms. Miller-Wagenknecht being found not guilty. Thereafter, Ms. Miller-Wagenknecht brought suit against City of Munroe Falls and the City's Tax Administrator, Ms. Bette Lyons, for malicious prosecution, abuse of process and equal protection violations. A unanimous jury found the Respondents not liable on all of Petitioner's claims.

The Petitioner raises the following issues:

I. Whether a tax administrator or a municipal entity is guilty of malicious prosecution, abuse of process and equal protection violations when they institute proceedings against an individual for failing to pay her taxes in light of the facts that, a) the individual filled out city forms indicating she is a resident of the municipality; b) the municipality sent repeated correspondence to the individual requesting that she pay her local taxes and/or respond to inquiry; c) the individual indicates she is not going to pay her taxes and to "talk to my lawyer;" and d) the individual enters into a plea agreement whereby she agrees to pay taxes to the local municipality and then fails to timely pay her taxes the following year.

QUESTIONS PRESENTED – Continued

II. Whether the trial court erred when it instructed the jury on the applicable law for malicious prosecution and probable cause.

III. Whether a general denial in an answer, which is not recanted but is later established, can be the basis for judgment against a civil defendant, and further, if said issue can be raised for the first time on appeal at the state Supreme Court level.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
I. Clarification of the Record	1
Reasons for Denying the Writ	3
I. Petitioner has not articulated a compelling reason to justify discretionary review by this Court.	3
A. Petitioner confuses a plaintiff's burden of proof in a civil malicious prosecution case with a Prosecutor's burden of proof in a criminal proceeding	3
B. The Court did not err in its charge to the jury regarding the applicable law of malicious prosecution and probable cause...	6
C. Petitioner's proposition that a failure to recant a general denial which is subsequently established by the trial court entitles a plaintiff to judgment is erroneous....	8
Conclusion	9

TABLE OF AUTHORITIES

Page

CASES

Bostic v. Connor, 37 Ohio St. 3d 144, 524 N.E. 2d 881 (1988) 8

Bryan v. United States, 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed. 2d 197 (1998) 4

Carruba v. Transit Casualty Co., 443 F.2d 260 (6th Cir. 1971) 7

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed. 2d 617 (1991) 3, 4, 5, 6, 7

Cleveland Electric Illuminating Co. v. Astorhurst Land Co., 18 Ohio St. 3d 268, 480 N.E. 2d 794 (1985) 7

Grandsky v. Sperry Rand Corp., 489 F.2d 502 (6th Cir. 1973) 7

In re: Terence J. Meyers, 196 F.3d 622 (6th Cir. 1999) 4

Ohio Farmer's Ins. Co. v. Cochran, 104 Ohio St. 427, 135 N.E. 537 (1922) 7

Pergola v. Pennsylvania Road Company, 311 F.2d 837 (6th Cir. 1963) 6

Perry v. Adjustable Awning, Inc., 117 Ohio App. 486, 192 N.E. 2d 672 (9th Dist. 1962) 6

Reichert v. Ingersoll, 18 Ohio St. 3d 220, 480 N.E. 2d 802 (1985) 7

Saucier v. Katz, 121 S.Ct. 2151, 533 U.S. 194, 150 L.Ed. 2d 272 (2001) 5

Trussell v. General Motors Corp., 53 Ohio St. 3d 142, 559 N.E. 2d 732 (1990) 5

TABLE OF AUTHORITIES – Continued

Page

Wagenheim v. Alexander Grant & Co., 19 Ohio App. 3d 7, 482 N.E. 2d 955 (10th Dist.1983)..... 7

Walczesky v. Horvits Co., 26 Ohio St. 2d 146, 269 N.E. 2d 844 (1971)..... 7

RULE

Supreme Court Rule 10 3

RESPONDENTS CITY OF MUNROE FALLS AND BETTE LYONS' BRIEF IN OPPOSITION TO JACQUELINE MILLER-WAGENKNECT'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Judicial District accurately set forth the pertinent facts related to Miller-Wagenknecht's claims. [Pet., App. C, pp. 22-40.] Briefly stated, this case involves Miller-Wagenknecht's failure to pay taxes to City of Munroe Falls for tax years 1994 and 1995. Following Petitioner's 1994 prosecution, which resulted in a plea agreement, and following Petitioner's 1995 prosecution, which resulted in a finding of not guilty, Petitioner filed her civil suit alleging malicious prosecution, abuse of process and equal protection violations. The trial resulted in an unanimous jury finding in favor of the Respondents on all counts.

I. CLARIFICATION OF THE RECORD

Petitioner incorrectly indicates that this case arises out of her "efforts to comply" with local tax laws. Similar to Petitioner's decision to ignore her obligation to pay taxes, Petitioner's statement of the case ignores the fact that she was repeatedly mailed letters indicating her need to pay taxes to the City of Munroe Falls. [Pet., App. C, pp. 23-24, 28-29.] Petitioner also failed to include that following her failure to pay local taxes for 1994, she entered into a plea bargain whereby she acknowledged her requirement to pay local taxes. [Pet., App. C, pp. 23-24, 28-29.] Also, while Petitioner acknowledges that she sent a request for an extension to file her tax returns for the tax year 1995, she fails to include the fact that her request for

an extension was untimely and did not have the proper attachments. [Pet., App. C, pp. 23-24, 28-29.] Indeed, following these attempts to have Petitioner pay her taxes, the Respondent City of Munroe Falls made further attempts to contact her regarding her tax delinquency for the second year in a row. [Pet., App. C, pp. 23-24, 28-29.] The evidence before the trial court demonstrated that following Petitioner's second annual failure to timely pay taxes, she refused to respond to inquiry by the City of Munroe Falls and its Tax Administrator, Ms. Bette Lyons. [Pet., App. C, pp. 23-24, 28-29.]

Petitioner also states that her "good faith belief" that she did not have to pay City of Munroe Falls taxes was based on the fact that she was not "domiciled" in Munroe Falls. The record below belies Petitioner's assertion. It is admitted that Petitioner purchased a home at 174 Cheltenham Lane in the City of Munroe Falls on August 31, 1994. On September 28, 1994, Petitioner executed a water contract with the City of Munroe Falls for her residence. On October 30, 1994, Petitioner submitted a Residence Information Sheet with the Income Tax Department for the City of Munroe Falls stating that she started residency in the City of Munroe Falls on October 10, 1994. [Pet., App. C, pp. 23-24, 28-29.]

It is, however, worth pointing out that Petitioner makes reference to the fact that she told the City of Munroe Falls that she was not going to pay taxes based on her belief that she was not required to file Munroe Falls taxes, and further, that if the City of Munroe Falls had additional questions, they could talk with her attorney. [Pet. 4.]

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction over her appeal to this Court.

A. PETITIONER CONFUSES A PLAINTIFF'S BURDEN OF PROOF IN A CIVIL MALICIOUS PROSECUTION CASE WITH THE PROSECUTOR'S BURDEN OF PROOF IN A CRIMINAL PROCEEDING.

The thrust of Petitioner's argument for this Court to accept jurisdiction is that pursuant to *Cheek v. United States,* 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed. 2d 617 (1991), the government may not prosecute citizens for failure to pay their taxes where that failure was not intentional, but rather, arose from a genuine misunderstanding of a tax provision. Since 1991, tax protestors have sought to construe *Cheek* as standing for the principal that the government must establish a taxpayer willfully failed to pay her taxes before instituting criminal proceedings. Respondents submit that *Cheek* does not stand for this principle.

As argued below, the *Cheek* case involved a criminal/federal tax prosecution. Specifically at issue was the interpretation of the word "willful" as it appeared in the

federal tax code. This Court determined that the defendant in *Cheek* was entitled to a jury instruction at his criminal trial regarding his good faith belief in failing to file or pay his taxes. *Id.* The *Cheek* case does not have blanket applicability to all "failure to file or pay taxes" cases in the criminal *or* civil context.

Importantly, this Court has limited the applicability of *Cheek*. In *Bryan v. United States*, 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed. 2d 197 (1998), this Court distinguished the "willful" analysis of *Cheek* based on the fact that the *Cheek* prosecution involved "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." Moreover, the interpretation of the term "willful" applies expressly to provisions of the U. S. tax code. Other Courts have similarly limited *Cheek* to its facts. (See, e.g. *In re: Terence J. Meyers*, 196 F.3d 622 (6th Cir. 1999), distinguishing *Cheek* and finding that the lower court properly granted summary judgment. The Court dismissed plaintiff-appellant's arguments that he did not honestly believe he needed to pay taxes.)

The matter before this Court does not involve the U.S. tax code, but rather, the City of Munroe Falls tax ordinance. The Munroe Falls tax ordinance is not a "highly technical" tax provision. Indeed, the tax ordinance for the City of Munroe Falls is very straight forward. Munroe Falls Ordinance Section 181.99(A)(1) and (11) provides: "Any person who * * * (f)ails, neglects or refuses to make any return or declaration required by this Chapter * * * shall be guilty of a misdemeanor." Munroe Falls Ordinance 181.05 requires each taxpayer to file a return on or before April 30 for the previous tax year. Accordingly the *Cheek* case is simply inapplicable.

Petitioner moved to the City of Munroe Falls and submitted various forms acknowledging her residency. Petitioner then simply sought to avoid paying taxes by declaring that she was not "domiciled" in Munroe Falls and, therefore, was not going to pay any local taxes. Following a plea agreement arising out of her failure to pay taxes for the tax year 1994, Petitioner again failed to pay her Munroe Falls taxes for tax year 1995.

Assuming *arguendo* the rationale in *Cheek* had some applicability to the matter at issue, *Cheek* sets forth the requisite standards for a criminal prosecution and the matter herein is civil. To prevail on a claim of malicious prosecution in the state of Ohio, a plaintiff must provide evidence of each element of malicious prosecution: (1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused. *Trussell v. General Motors Corp.*, 53 Ohio St. 3d 142, 559 N.E. 2d 732 (1990). Here, Petitioner focuses on the City's failure to prove her intent regarding her failure to pay local taxes. Throughout this lawsuit, Petitioner has confused the burden necessary to sustain a conviction for tax evasion with plaintiff's burden to prevail in a malicious prosecution claim.

"Probable cause" is an analysis of the arresting party's reasonable belief, considering the facts and circumstances known to them at that time, as to the guilt of the party to be charged. *Saucier v. Katz*, 121 S.Ct. 2151, 533 U.S. 194, 150 L.Ed. 2d 272 (2001). Accordingly, a person instituting criminal proceedings need not have evidence which establishes a criminal defendant's guilt beyond a reasonable doubt prior to bringing those charges; rather, the charging party merely needs a reasonable belief based on the facts and circumstances presented at that time. *Id.* Accordingly,

in Ohio, a plaintiff in a malicious prosecution claim must prove more than his or her acquittal, he or she must prove malice and a lack of probable cause. *Pergola v. Pennsylvania Road Company,* 311 F.2d 837, 838 (6th Cir. 1963). Yet no action for malicious prosecution will lie if probable cause to arrest and prosecute exists, even when express malice is proved. *Perry v. Adjustable Awning, Inc.*, 117 Ohio App. 486, 487, 192 N.E. 2d 672 (9th Dist. 1962).

It is undisputed that Petitioner failed to respond to Respondents' repeated inquiries and attempts to have Petitioner pay her local taxes. It is also undisputed that Petitioner entered into a plea agreement whereby she agreed to pay Munroe Falls taxes. When considering Petitioner's conduct in light of the express terms of the Munroe Falls tax ordinance, probable cause existed to charge Petitioner with failing to pay her taxes. Indeed, assuming *arguendo Cheek v. United States*, *supra*, is applicable to this matter, the Petitioner's admitted conduct evidences she *willfully* failed to pay her taxes.

B. THE COURT DID NOT ERR IN ITS CHARGE TO THE JURY REGARDING THE APPLICABLE LAW OF MALICIOUS PROSECUTION AND PROBABLE CAUSE.

Petitioner's second argument in support of jurisdiction fails as it is dependent upon the flawed reasoning of Petitioner's first argument. Petitioner wrongly asserts that Respondents needed to establish her intent, or "willfulness," in failing to pay her taxes prior to the institution of criminal proceedings. Based upon this incorrect premise, Petitioner alleges that the trial court erred when it failed to give the jury a corresponding instruction on

Respondents' failure to establish Petitioner's intent or "willfulness" in failing to pay her taxes.

As stated above, *Cheek, supra,* simply does *not* stand for the principle that state and local officials need to establish an individual's intent to not pay taxes prior to instituting criminal proceedings. Accordingly, the trial court did not err in giving Petitioner's erroneous instruction.

In Ohio, the standard on appeal for a court's charge to the jury is whether the charge, taken as a whole, fairly and accurately submits the issues and applicable law to the jury. *Grandsky v. Sperry Rand Corp.*, 489 F.2d 502, 503-504 (6th Cir. 1973). Indeed, a jury charge must be considered as a whole, and a reviewing court must determine whether the jury charge misled the jury in a matter materially affecting the complaining party's substantial rights. *Ohio Farmer's Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922), paragraph six of the syllabus; *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App. 3d 7, 482 N.E. 2d 955 (10th Dist. 1983). A judge does not commit error because he or she fails to use language contained in a request, so long as the instruction given is accurate and sufficient. *Carruba v. Transit Casualty Co.*, 443 F.2d 260, 264 (6th Cir. 1971). A failure to give a proposed jury instruction is subject to a "plain error" review. *Reichert v. Ingersoll*, 18 Ohio St. 3d 220, 480 N.E. 2d 802 (1985). The plain error doctrine is used in civil matters only under exceptional circumstances to prevent a manifest miscarriage of justice. *Id.*; see also, *Cleveland Electric Illuminating Co. v. Astorhurst Land Co.,* 18 Ohio St. 3d 268, 275, 480 N.E. 2d 794 (1985). Lastly, a trial court can properly reject proposed jury instructions it considers confusing. *Walczesky v. Horvitz Co.*, 26 Ohio St. 2d 146, 151, 269 N.E.

2d 844 (1971). A trial court can also reject an instruction if, within its discretion, it feels the instruction is redundant or immaterial. *Bostic v. Connor*, 37 Ohio St. 3d 144, 524 N.E. 2d 881 (1988).

In the matter at issue, the trial court's jury instructions, taken as a whole, accurately set forth the controlling law on the applicable issues, including malicious prosecution and probable cause.

The trial court properly instructed the jury as to probable cause and malicious prosecution. [Pet., App. C, pp. 26-27.] As stated by the Court of Appeals for the Ninth Judicial District, "Although willfulness must be shown in a criminal case, to prove malicious prosecution in a civil case all that is needed is to show probable cause for the offense. The trial court need not discuss the final points of *mens rea*." [Pet., App. C, p. 26.]

A unanimous jury found that probable cause existed to charge Petitioner with failure to pay her taxes, and accordingly, no error occurred. This Honorable Court need not exercise jurisdiction over Petitioner's Writ.

C. PETITIONER'S PROPOSITION THAT A FAILURE TO RECANT A GENERAL DENIAL WHICH IS SUBSEQUENTLY ESTABLISHED BY THE TRIAL COURT ENTITLES A PLAINTIFF TO JUDGMENT IS ERRONEOUS.

As an initial matter, Respondents request this Court not exercise jurisdiction over this matter based on the fact that Petitioner's third assertion, as set forth above, was not raised until briefs were submitted to the Ohio Supreme Court.

Second, Petitioner's argument that a general denial to a claim, which is eventually established, must result in judgment for plaintiffs is unsupported by the common law and the civil rules. Respondents submit that a rule whereby an "unrecanted," general denial results in judgment for plaintiff would be a drastic and unnecessary alteration of the civil rules. Accordingly, as Petitioner cites no precedent or rationale for her position, Respondents submit that this Court need not exercise jurisdiction to entertain such matters.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN T. MCLANDRICH
Counsel of Record
PAUL J. CRISTALLO
MAZANEC, RASKIN & RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906

Counsel for Respondents City of Munroe Falls and Bette Lyons, in her official capacity

(3)

Supreme Court, U.S.
FILED
AUG 26 2002
CLERK

CASE NO. 02 -79

IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 2001

JACQUELINE J. MILLER-WAGENKNECHT
Petitioner,
V.
CITY OF MUNROE FALLS AND BETTE LYONS
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

Jacqueline J. Miller-Wagenknecht , Pro Se
P.O. Box 22458
Akron, Ohio 44302
Petitioner
330-573-4501

13 pp

TABLE OF CONTENTS

Page

Table of Contents..... i
Table Of Authorities Cited.....ii
Introduction.....1
Petitioner's Additional Compelling Reasons To Justify
Discretionary Review By The Court.....1
Conclusion.....10

TABLE OF AUTHORITIES CITED

Page

Link v. Wabash R.R., Co. 370 U.S. 626 (1962).....10

STATUTORY

Code of Professional Responsibility DR- 1-102 3
Code of Professional Responsibility DR- 7-102 3
Gov. Bar R. I. Sec. 8.....1
Rule 5 sec. 4 of the Rules Of
The Supreme Court Of The United States.....1,2

PETITIONER JACQUELINE J. MILLER-WAGENKNECHT 'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

INTRODUCTION

Petitioner shall reply to only new issues raised by Respondents . Because of page limitation Petitioner shall address only some of the myriad of abuses by Respondents.

I. PETITIONER'S ADDITIONAL COMPELLING REASONS TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

A. VIOLATION OF OATH OF OFFICE

Respondents attorney's to practice before this Honorable Court as well as the State of Ohio had to sign/swear to an oath. The United States Supreme Court requires that each applicant shall sign the following oath

> " I, _____, do solemnly swear(or affirm) that as an attorney and as a counselor of this Court , I will conduct myself **uprightly** and according to law, and that I will support the Constitution of the United States."
> (Rule 5 sec.4 of the Rules of The Supreme Court of The United States. Emphasis added)

Likewise, for induction to the Bar in Ohio, Gov. Bar R. I Sec. 8 states that each applicant accepted for admission to the

practice of law in Ohio shall take the following oath of office:

> " I,_____, hereby (swear or affirm) that I will support the Constitution and laws of the United States and the Constitution and the laws of Ohio, and I will abide by the Code of Professional Responsibility.
>
> In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges , court staff, clients, fellow professionals, and all other persons.
>
> I will honestly, faithfully, and competently discharge the duties of an attorney at law.(So help me God)" Gov. Bar R. I. Sec 8 para A)

Obviously Respondents' attorneys do not take their oaths seriously or fear any repercussion from their violation. Why else would Respondents have no apprehension of beginning their Brief in Opposition with a libelous statement. Respondents' states as fact that Petitioner is a tax protestor. The only thing Petitioner protests is having two tax Administrators attempt to abuse their position of Authority as retaliation when Petitioner refused to fund Tax Administrator JoAnn Raber's personal needs.

Respondents sole purpose to make such a libelous statement was to induce an evil opinion of Petitioner in this Honorable Court's mind. In today's vernacular , a tax protestor has a negative connotation that equates to a presumption that the labeled person is involved in an illegal or unlawful act.

Since Respondents cannot dispute the law or facts their tactic was to create new law , new facts and attack Petitioner's integrity and character. Respondents' strategy was to create a

false image of Miller- Wagenknecht that would be so repugnant to the United States Supreme Court that when confronted with the true facts and the proper law, the Court would be tuned out. What was this false image that the court would have to filter information through? That Miller-Wagenknecht refused to pay taxes and was a tax protestor. [Res. Questioned Presented page i].

It is undisputed and the record below supports that Miller-Wagenknecht had always hired tax professionals, a CPA firm , and / or tax attorneys to handle any tax obligation. Such is this case even today. It was never disputed that Miller-Wagenknecht paid taxes.

Not being an attorney, Petitioner did not understand that she should have started the Petition For Writ Of Certiorari with derogatory name calling. Instead Petitioner argued the true facts and law.

B. VIOLATION OF THE CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 1-102 states in pertinent part that:

" (A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit , or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on then lawyer's fitness to practice law...

Disciplinary Rule 7-102 states in pertinent part that

(A) In his representation of a client, a lawyer shall not:

(3) Conceal or knowingly fail to disclose that which is required by law to reveal.
(4) Knowingly used perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal conduct or fraudulent.

Respondents' Attorneys throughout this lawsuit have made an art of violating the Code of Professional Responsibility. What follows are examples of Respondents Attorneys' Conduct that violates the above listed disciplinary rules.

For example when applying the law to Petitioner , compliance with the statute or ordinance becomes one of strict liability. However, for Respondents the law or a Judges' Order is merely suggestive. Petitioner was criminally prosecuted a second time because the extension request was postmarked one day late even though Petitioner's attorney testified he mailed it timely. Petitioner's original complaint against Bette Lyons and Munroe Falls was filed on May 15, 1997 with the amended complaint filed on October 28, 1998. Bette Lyons in her individual capacity still did not answer the original complaint or amended complaint by the hearing date of August 11, 2000 before Magistrate John H. Shoemaker to address several motions including sanctions against Respondents.

Mr. Ludwig: The City has-- we just never answered individually, and I don't , Your Honor , that it's going to make a any dern different that what---

The Court: Well, then, good. You got until a

week from today to get an answer.
[see transcript of proceedings, Summit County Court of Common Pleas , August 11, 2000, pg 90.]

Bette Lyons had over three years to answer the complaint and still did not . Now that' s willfully failed , refused, or neglect to do a known duty.

At the same hearing both Attorney Stoffers and Ludwig had to admit that they willfully failed , refused, or neglect to obey Judge Cosgrove's Order regarding her discovery order .

Mr. Stoffers: I thought what I submitted was appropriate at that time. There was no objection until this motion was filed.

The Court: Well, you're telling me that you knew what the judge said in this order and you decided to be creative, apparently , and do something other than what she said because there's no doubt from what you just explained to me you knew what the procedure was by the sentence, and yet you didn't do it, did you?

[see transcript of proceedings, Summit County Court of Common Pleas , August 11, 2000, pg 90.]

Did the Court's chastising temper respondents attorneys behavior? No as the next example demonstrates.

In closing arguments Attorney Stoffers for Respondents made an issue that " We (defendants) brought in Ann Youngblood regarding. Nothing to do with Doylestown. She said unequivocally there is no 94 return in our file. And then at

the last minute they come up with an undated , unsigned one without a check". [Tr., Vol. 5, pg. 735]. The Court permitted Respondents to have Ann Youngblood testify over Petitioner's objections. Ann Youngblood was not on their witness list [Tr., Vol. 4, pg. 558] Allegedly, Youngblood was needed as a foundation witness to introduce a document. Instead ,she testified that she had no documents. Because of the surprise tactic, Petitioner was only able to find an unsigned copy in the files at hand. [Tr., Vol. 4, pg. 560]

However, Attorney Stoffers knew when conducting the direct examination of Youngblood that he was in possession of a signed 1994 Doylestown tax return. Furthermore he knew that it was withheld from submission by him to the court reporter conducting the deposition of Attorney Brent English. The questioner was Attorney Stoffers . Attorney English answered.

Q: Can I see that again? The tax return I have for Doylestown is different that the-

A: Is that what you're referring to? You can take that apart if you want?

Q: Okay. One is signed and one isn't, that's what I was-

A: Okay. Seems to be the same return.

Q: Right. The attached to it is the federal return.

[Deposition of Brent English , September 11, 2000, pp 67-70]

When Petitioner filed a Motion To Correct The Record to include the signed return, Judge Cosgrove denied the motion.

Respondents Attorneys continued the trend of unethical conduct as demonstrated by the next several examples dealing

with witnesses.

Attorney Stoffers continued his web of deceit on the Court by making sure his witnesses either have selective amnesia or downright lie and perjure themselves. Youngblood denied having a conversation with Miller-Wagenknecht until Miller-Wagenknecht produced a tape of the conversation. The audio tape would have proved that Youngblood was lying but Judge Cosgrove would not permit the tape to be played. [Tr., Vol. 4, pg. 560-565]

Bette Lyons entire testimony was essentially I don't recall, not to my knowledge responses. She was coached so well that one my be concerned that she has the early stages of Alzheimer.

On the front page of the September 3, 1999 *Akron Beacon Journal* appeared the article " **19 - CENT OVERSIGHT COST COUPLE NEARLY $900**" by Carol Biliczky. Bette Lyons had brought criminal charges against Heidi and Steve Celaschi for not paying 19 cents. The Celaschi couple denied that they received mail from Bette Lyons. Furthermore Bette Lyons goofed and did receive the payment but applied to the wrong year.[see Tr. Plaintiff's Exhibits for trial no 57].

On cross examination the following exchange occurred between Petitioner's Attorney and Bette Lyons:

Q: Have you ever had anyone say that things were mailed and not received?
A: Mailed by whom and received by whom?
Q: A taxpayer, any taxpayer in Munroe Falls?
A: Mailed by whom?
Q: You, the Tax Administrator.

A: By a taxpayer?
Q: That's correct.
A: That-whom didn't receive it?
Q: I am asking you . Has anyone said that they mailed something to you-excuse me. Was there any other time that received things in the mail that you might have mistakenly misplaced?
A: Not to my knowledge.
Q: Has there been any time that you had received things in the mail and - maybe a check or something, or payment, and misapplied it?
A: To another account ? Misapplied it to a different account?
Q: Let's say a person mailed some payment in for a tax year and it was misapplied to a different tax year?
A: What instances are you referring to?
[Tr. Vol. 4, pp 633-634]

Petitioner's counsel then requested a side bar to be permitted to ask Bette Lyons about the Celaschi's but was again denied. Does any reasonable person believe that Bette Lyons did not recall that she was lambasted in the *Akron Beacon Journal* regarding the prosecution of the Celaschi's for 19 cents especially since the article made it to the Montel Williams Show and the National Enquirer

Judge Cosgrove would not permit any testimony regarding this incident whether on direct or rebuttal. No one could locate the Celaschi(s). Not even their Attorney Tony Dayalanis. The trial court denied Petitioners to have Attorney Dayalanis testify on direct. Attorney Dayalanis would have testified that what occurred to his clients was essentially what

happened to Miller-Wagenknecht that there was no notice, Bette Lyons alleged phone calls were made by her that did not occur, items mailed to the tax administrator were alleged not received, and that Munroe Falls procedure for nonfilers was not followed by Bette Lyons. [Tr., Vol 3. Pp 481-484]

The Court also denied Petitioner permission for Attorney Dayalanis to testify to impeach Prosecutor Dwayne Jones regarding his denial that he represented complaints by Bette Lyons were without merit.[Tr. Vol 3, p. 458, pp. 484-485]

Jo Ann Raber's testimony seems to be orchestrated to comport with her close and personal friend Bette Lyons. Raber was the former Doylestown Tax Administrator who attempted to extort money from Petitioner. Raber approached Miller-Wagenknecht for money as a result of domestic violence and/or to cover legal fees. Petitioner refused. Also, Raber and Lyons had approached Miller-Wagenknecht regarding cashing in an insurance policy on her husband without his knowledge and consent. Raber seemed for desperate money. Raber represented to Miller-Wagenknecht that she would be contacted by her friend, Bette Lyons. Petitioner again refused to help Raber.

Raber at trial testified and denied having martial problems. She denied that she had come to the Wagenknechts for help, that she went to a women's shelter, and that she was a victim of domestic violence. She also had a lapse of memory over the money and Lyons involvement. Petitioner's counsel contacted the Wayne County Sheriff's Department that confirmed via fax the existence of three Domestic Violence reports S94-4515-C, S91-5305 C, and S95-5996-C. Judge Cosgrove was informed of this and other evidence that would

again prove purjured testimony. It was later established that Raber filed for divorce in 1995 , case no. 95-DR-0531. Petitioner was denied the opportunity to introduce evidence or testimony that would impeach the credibility and testimony of Raber.. Taking an oath in Judge Cosgrove's Court meant nothing. You could lie, cheat and steal and Cosgrove would turn her head and look the other way. Instead the Court let tainted testimony go to the jury . [Tr. Vol 4 pp. 526-547]

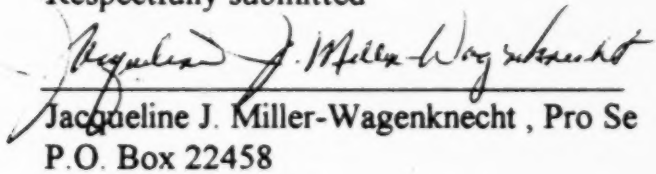
Respondents strategy worked. The false image was made. One merely has to look at the appeals court representation of facts as well as their description of Miller-Wagenknecht as the reluctant taxpayer. [Pet., App. C, pp. 23-24, 32]

Finally, Respondents voluntarily chose these attorneys as their representatives in this action, and cannot now avoid the consequences of the acts or omissions of these freely selected agents. *Link v. Wabash R.R., Co.* 370 U.S. 626, 633-34(1962)

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted



Jacqueline J. Miller-Wagenknecht , Pro Se
P.O. Box 22458
Akron, Ohio 44302
Petitioner
330-573-4501